

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Geographic Partitioning and Spectrum)
Disaggregation by Commercial Mobile)
Radio Services Licensees)

WT Docket No. 96-148

Implementation of Section 257 of the)
Communications Act -)
Elimination of Market Entry Barriers)

GN Docket No. 96-113

COMMENTS
of the
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

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The National Telephone Association ("NTCA") submits these comments to the Notice of Proposed Rulemaking ("NPRM") released on July 15, 1996. The NPRM proposes to change Commission rules to allow the partitioning of broadband Personal Communications Services ("PCS") licenses. Under the changes, licensees in the A, B, D, and E blocks could partition their license area at any time to entities that meet minimum eligibility requirements. These entities need not be "small businesses" or "entrepreneurs" defined under the Commission's rules. Licensees of the so called entrepreneur blocks C and F would be allowed to partition at any time to entities that qualify as entrepreneurs, small businesses, women or minorities and meet minimum eligibility requirements. Block C and F licenses would also be allowed to partition to anyone regardless of financial size after a five year holding period. The Commission also proposes to permit disaggregation of PCS spectrum prior to January 1, 2000, the date on which disaggregation would first be permitted in its current rules.

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NTCA is a national association of approximately 500 local exchange carriers (“LECs”) that provide service primarily in rural areas. All NTCA members are “rural telephone companies” under the Commission’s rules and the provisions of 47 U.S.C. § 309(j). All but a few also meet the Commission’s small business definition for PCS (average annual gross revenues that are not more than \$40 million for the preceding three calendar years.)¹ NTCA’s comments at this stage of the proceeding are limited to the proposal to change the partitioning rules.

II. SPECIAL PROVISIONS ARE NEEDED TO ENSURE THAT THE OBJECTIVES OF SECTION 309(j) ARE NOT ABANDONED WITH RESPECT TO RURAL AREAS.

The Commission’s proposal to permit entities of any financial size to partition Block A, B, D and E rural areas would revoke the preference it gave rural telephone companies in the *Competitive Bidding Fifth Report and Order*.² That right was exclusive and limited to the rural areas served by a rural telephone company. Under the existing rule, a rural telephone company partitioned area must include all portions of the wireline service area of the rural telephone company that lies within the PCS service area and must conform to established geopolitical boundaries, such as county lines. In the case of rural telephone companies that receive a partitioned license post-auction, the partitioned area must be reasonably related to the rural telephone company’s service area that lies within the PCS area. A presumption of

¹ 47 C.F.R. § 24.720.

² Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5532, 5597-99 (1994)(*Competitive Bidding Fifth Report and Order*).

reasonableness is applied to areas that contain no more than twice the population of that portion of a rural telephone company's wireline service area that lies within the PCS service area.³

When the Commission established partitioning for rural telephone companies its purpose was to provide the companies actual opportunities to obtain licenses to provide PCS in their rural telephone service areas. The Commission expected all rural telephone companies to have viable opportunities to provide PCS in their telephone service areas because it thought its rules would allow the rural companies to bid on blocks C and F "without competition from the large telephone companies and other deep-pocketed bidders." The Commission said:

We believe that the partitioning plan we are adopting will provide rural telephone companies with substantial capabilities to acquire licenses to provide broadband PCS in their rural telephone service areas, consistent with our statutory mandate. [Emphasis added] In addition, our eligibility criteria for bidding in the entrepreneurs' blocks, . . . will permit virtually all telephone companies whose service areas are predominantly rural to bid on licenses in frequency blocks C and F without competition from the large telephone companies and other deep-pocketed bidders.⁴

The Commission noted that rural telephone companies that qualified as women, minorities or small businesses would enjoy the preferences accorded those entities but declined to adopt any other measure besides partitioning to ensure opportunities for rural companies or deployment of PCS services to rural areas, saying:

We do not think that any other measures are necessary in order to satisfy the statute's directive that we ensure that rural telephone companies have the opportunity to participate in the provision of spectrum-based services, and to satisfy our goals to ensure that PCS is provided to all areas of the country including rural areas.⁵

³ *Id.*, 5600.

⁴ *Id.*, 5599.

⁵ *Id.*

These passages indicate that the Commission's intent in establishing partitioning for rural areas was that this single measure would permit rural telephone companies to acquire licenses to serve their telephone service area. The Commission also believed that rural telephone companies would not have to compete with deep pockets for the Basic Trading Area ("BTA") Block C licenses overlapping their telephone service areas. History has now proven that belief to be incorrect.⁶ The Commission's rules enabled deep pockets, including the large telephone companies it expected to be left out of the C block auctions to dominate those auctions as well as the Block A and B auctions. As a result of the rules, licensees on Blocks A, B and C are mostly large entities or companies backed by large investors who until now have shown little inclination to bargain with rural telephone companies for the partitioning of their Block A, B and C geographic areas. The Commission's proposal to allow entities of any size to partition any size territory on the A, B, D and E blocks and other designated entities to partition Blocks C and F anywhere will certainly result in further deterioration of any bargaining power rural telephone companies might have had and reduce those licensees' incentives to partition sparsely populated rural areas. The changed rules will reduce incentives to negotiate arrangements for partitioned rural areas. Licensees interested in partitioning can be expected to concentrate their efforts on more densely populated or marginally dense areas at the expense of the truly sparsely populated areas served by rural telephone companies.⁷

⁶ Fifteen Rural Telecommunications, No. 4, 24-25, *PCS Auction Results*, (July - August 1996).

⁷ The latest available statistics, *1994 Statistical Report, Rural Telecommunications Borrowers*, show that the areas served by 695 Rural Utility Service borrowers average 5.99 subscribers per route mile and 4.65 per square mile.

The Commission 's proposal to open partitioning of Blocks A, B, D and E permit any eligible entity to obtain a partitioned license to serve a rural telephone company service area is contrary to its stated objective in establishing partitioning. The change will eliminate rural telephone companies as viable contenders in their areas in much the same way that the control group and attribution rules eliminated most bidders not backed by large entities from the Block C auctions. The Commission cannot ignore the fact that it did not accomplish its policy goals in the Block C auctions. The Commission may have raised \$20 billion but it has not achieved the Section 309(j) policy objectives it articulated with respect to rural areas and rural telephone companies in the *Competitive Bidding Fifth Report and Order*. The Commission should now recognize that the proposed change insofar as it applies to rural areas will further eviscerate Section 309(j) by allowing large entities to ignore rural areas and diminishing the opportunities of rural telephone companies to serve those areas with PCS.

Until the proposed rule change, rural telephone companies have justifiably relied on the assumption that PCS licensees would have to negotiate with them if they had an interest in partitioning. Some rural telephone companies have opted not to participate in the auctions in reliance on that assumption. The rule change disturbs business plans based on prior rules and destroys what negotiating leverage rural telephone companies may have had. These factors combined may augment the rights or preferences accorded others but amount to a revocation of the sole benefit previously accorded rural telephone companies under Section 309(j). Given that reality and the failure of the C block auctions to provide opportunities for all but a few rural telephone companies, the Commission should consider in this proceeding adopting other measures to ensure compliance with its original objective and the statutory mandate.

Changing the rules to provide opportunities to other designated entities does not justify abandonment of the mandate with respect to rural telephone companies, especially since the Commission's stated objective of providing opportunities for other designated entities is not consistent with its proposal to open partitioning of Blocks A, B, D and E to any eligible entity regardless of financial size or designation under Section 309(j).

The Commission can preserve the objectives it set out to achieve in the *Competitive Bidding Fifth Report and Order* by adopting measures to ensure that rural telephone companies retaining the preference granted in the rules established in 1994. There is no need to revoke the preference accorded the companies to extend partitioning rights to other designated entities. The Commission can accomplish its goals of extending opportunities to Section 309(j) entities and also promote its objective for rural areas served by rural telephone companies. NTCA recommends that the Commission provide a "right of first refusal" that would require licensees on all PCS blocks to consider a rural telephone company request for partitioning of the wireline service area before it accepts an offer from any other entity.

NTCA recommends a simple procedure that would require licensees on all the PCS blocks to notify the rural telephone company that it has pending requests or offers to partition the rural telephone company's telephone service area. The rural telephone company should then have a definite time period or "window" during which it will be required to reply or state its interest in partitioning a PCS area that comports with existing rules defining what area is reasonably related to its wireline service area. Both parties should be required to negotiate in good faith whenever a rural telephone company gives notice of its interest in partitioning.

I. THE COMMISSION HAS NOT CONSIDERED ALTERNATIVES THAT MINIMIZE THE ADVERSE ECONOMIC IMPACT ITS RULE WILL HAVE ON RURAL TELEPHONE COMPANIES THAT ARE SMALL ENTITIES OR SMALL BUSINESSES.

The Commission's Initial Regulatory Flexibility Analysis ("IRFA") is defective because it fails to describe and identify significant alternatives to the proposed rule in order to accomplish the stated objectives of Section 309(j) and Section 257 of the Communications Act. The Commission states that the partitioning changes it proposes are intended to eliminate entry barriers into the telecommunications market for small businesses pursuant to Section 257 and to promote economic opportunity for a wide variety of applicants, including rural telephone companies, pursuant to Section 309(j).⁸ However, as shown above, the proposed rule creates opportunities for large entities rather than small businesses and actually diminishes opportunities for rural telephone companies in the course of creating economic opportunities for many entities that are not small businesses under Commission definitions for broadband PCS, Small Business Administration definitions under the Regulatory Flexibility Act ("RFA"), or any other measure. Because the proposed rule diminishes opportunities for rural telephone companies embraced under the statute whose objectives are the goal of the proposed changes, the Commission's IRFA must consider significant alternatives which would accomplish the goals of Section 309(j) with respect to these rural telephone companies.

In its analysis of significant alternatives, the Commission assumes that it has only two options: maintaining the status quo or changing it to permit other small businesses to obtain partitioned licenses. In the context of this restricted view, it concludes that limiting partitioning

⁸ *NPRM*, ¶ 1.

to rural telephone companies would not permit other small businesses to obtain licenses. This analysis is flawed because it does not take into account significant alternatives and ignores the objectives of Section 309(j) with respect to rural areas and rural telephone companies. It also fails to recognize that the rule change is not solely intended for small businesses. Any business will be able to partition four out of the six broadband PCS licenses. Further, there is, as NTCA has shown in Point I above, an available alternative which will accomplish the purposes of Section 309(j) with respect to rural areas and rural telephone companies while at the same time promoting the participation of other small businesses in the provision of PCS.

The Commission must consider how the “right of first refusal” alternative can minimize significant economic impacts on rural telephone companies that are “small entities” under the RFA. For the purposes of this *NPRM*, the Commission uses the definition of a “small business” under its broadband PCS rules (gross revenues less than \$40 million in each of the last three calendar years) to conduct the IRFA analysis. This definition includes all but a few NTCA members. NTCA does not object to the definition insofar as it applies to the broadband PCS rules but wishes to point out that the SBA definition of a “small entity” ordinarily determines what entities are included in an RFA analysis.⁹ The SBA’s definition in former 13 C.F.R. § 121.601 (now 13 C.F.R. § 121.201)¹⁰ sets the eligibility criteria for the SIC codes that describe

⁹ 13 C.F.R. § 121.902.

¹⁰ *See*, Small Business Size Regulations, 61 Fed. Reg. 3286 (January 31, 1996) now give a small entity adversely affected by final agency action the right to judicial review of agency compliance with the requirements of Sections 601, 604, 605(b) and 610 of the RFA.

LEC business operations at fewer than 1500 employees. Under that definition, all of NTCA's members are "small entities" whose interests must be considered in any RFA analysis affecting their operations.

NTCA strongly recommends that the Commission consider its recommended alternative in its final Regulatory Flexibility Analysis. A thorough analysis that comports with the RFA will avoid unnecessary litigation and ensure consideration of the small business interests Congress recently afforded more protections in the amendments to the RFA.¹¹

¹¹ Section 242 of Small Business Growth and Fairness Act of 1996, Pub. L. 104-121 (Approved March 29, 1996) now give a small entity adversely affected by final agency action the right to judicial review of agency compliance with the requirements of Sections 601, 604, 605(b) and 610 of the RFA.

CONCLUSION

For the above stated reasons, NTCA recommends that the Commission adopt measures to preserve the intent of its prior rule. The Commission can accomplish this objective by adopting in this proceeding a rule permitting rural telephone companies the first option to partition PCS licenses in their wireline service area. Partitioned areas under this option should conform to using current rules that define the parameters of a partitioned license in a rural telephone company wireline service area. Rural companies should also be permitted to obtain partitioned licenses outside their service areas under any new rules the Commission adopts for all other entities. NTCA also recommends that the alternative it recommends be considered in conjunction with the analysis the Commission is required to conduct under the RFA.

Respectfully submitted,

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August 15, 1996

CERTIFICATE OF SERVICE

I, Rita H. Bolden, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in WT Docket No 96-148, FCC 96-287 was served on this 15th day of August 1996, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list.

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